HOW TO LIMIT THE DOWNSTREAM COSTS OF RACIALLY RESTRICTIVE COVENANTS

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ABSTRACT

This essay, which is part of the University of Kansas Law Review Symposium on the seventy-fifth (75th) anniversary of *Shelley v. Kraemer*, is the first to explain how a current successor in interest to a racially restrictive covenant may limit more of their own downstream costs.[1] By definition, a downstream cost is any expense that arises after the formation, and in the course of performance, of a valid common law contract.[2] Examples of

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[1] *Home Is Where The Law Is: 75 Years Of Shelley v. Kraemer*, 72 KANSAS LAW REVIEW, https://law.ku.edu/academics/hands-on-learning/law-review/2023-kansas-law-review-symposium (Oct. 13, 2023) (describing the variety of subject matters dealt with by scholars on the seventy-fifth anniversary of Shelley). This essay focuses on how current property owners may use certain self-help options, i.e., title covenants, as a way to limit downstream costs. For purposes of this essay, the term successor in interest will be used as a synonym for the term current property owners. *Cf.* Merriam-Webster Dictionary, *Successor In Interest*, MERRIAM-WEBSTER.COM (2023) (defining this defined term to mean "a successor to another's interest in property."). according to a well-respected treatise on U.S. property law, it is well-established that:

> for a covenant to be enforceable by or against a remote party, it must have been enforceable between the original covenanting parities as a matter of contract law … Nearly all covenants for which enforcement is sought are created in a writing that satisfies the Statute … [of Frauds] …, such as a deed, easement agreement or lease. Even if the formalities have not been observed, the covenant may be saved via … [salvage doctrines such as] … estoppel or part performance. Dale A. Whitman, Ann M. Burkhart, R. Wilson Freyermuth and Troy A. Rule, THE LAW OF PROPERTY 389-90 (Fourth Edition, 2019).

In other legal contexts, the concept of self-help is more developed and has profoundly shaped how people understand the law, how the law works and how it applies to them. *See generally* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors* 208-9, A RESEARCH AGENDA FOR CORPORATE LAW (CHRISTOPHER M. BRUNER & MARC MOORE, EDS.) (EDWARD ELGAR PUBLISHING) (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388 (explaining that self-help may provide "a path forward to study the collective power of new generations of retail investors as well as how they can shift paradigms in corporate governance and in the relations between business corporations and society.").

[2] *See generally* Rachel Kay, *The Debate Over Downstream Costs: Research And Development*, THALES LEARNING & DEVELOPMENT, https://www.thales-ld.com/the-debate-over-downstream-costs-research-and-development/ (Sep. 30, 2022) (explaining that "downstream costs … can be defined as all expenses associated with providing the … services, as well as all necessary and ancillary expenses."). Downstream costs may

downstream costs include the time, money and energy that some property owners expend in removing racially restrictive covenants from their deeds.[3]

The essay does its work by encouraging more successors in interest to internalize their own downstream costs, at least on a prospective basis, by making use of self-help options like present and future title covenants.[4] In some cases, the present covenant against encumbrances may be used to limit the costs of removing racially restrictive covenants.[5] Whereas in other situations, wherein present title covenants are not available due to the fact that the closing already took place, a future covenant of further assurances

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be voluntary or not voluntary in nature. Examples of voluntarily-imposed downstream costs are when a current successor in interest to a racially restrictive covenant decides to remove these unenforceable terms without any encouragement from government. Whereas a non-voluntarily-imposed downstream costs is when a current property owner is encouraged to remove a racially restrictive covenant under penalty of law. One example of a law that provides such encouragement, in the form of a penalty, is Missouri House Bill 1662. *See generally* Missouri House of Representatives Bill 1662 (outlining the "laws regarding restrictive covenants … [, which include limitations on recording some subsequent transfers, and] … expanding the definition of prohibited covenants.").

[3] Some of these downstream costs may be limited, on a prospective basis, by interested third-parties such as the U.S. news media. *See, e.g.,* Corinne Ruff, *Does Your Home Have A Racially Restrictive Covenant?*, ST. LOUIS PUBLIC RADIO, https://www.stlpr.org/culture-history/2021-05-28/does-your-home-have-a-racially-restrictive-covenant-help-inform-our-reporting (May 28, 2021), explaining that:

> St. Louis Public Radio is partnering with NPR to collect documents and the stories behind them to show the lasting impact … [racially restrictive covenants] … have had on how … [the St. Louis] … region has developed … [in the wake of *Shelley*].

[4] It is well-established that a "deed usually contains title covenants – express promises by the grantor about the state of title … At common law, the promises … ended at the closing unless they were restated in the deed." John G. Sprankling & Raymond R. Coletta, Property: A Contemporary Approach 550 (Fifth Edition, 2021); *Cf.* Whitman, supra note 1 at 806-7, explaining it is understood that if this modest requirement is met the parties would be able to create narrow exceptions to the merger doctrine such as:

> The three 'present' covenants (seisin, right to convey, and against encumbrances) are so called because they are breached, if at all, the moment the deed is delivered and accepted … The treatment of the three 'future' covenants (warranty, quiet enjoyment, and further assurances) is quite different. They are breached only when the covenantee is actually disturbed by one with paramount title, and event termed an eviction even though it does not necessarily signify actual loss of possession.

[5] *See id*. at 804-6, explaining, in terms of the present covenant against encumbrances:

> an encumbrance is some outstanding right or interest in a third party which does not totally negate the title which the deed purports to convey. Typical encumbrances include mortgages, liens, easements, leases and restrictive covenants … [as one of the] … three 'present' covenants … [this limited warranty will be] … breached, if at all, the moment the deed is delivered and accepted … The statute of limitations begins to run against the grantee at the time, and thus may bar any claim before the grantee even discovers the title is defective. Moreover, the present covenants are usually held not to 'run with the land' and hence do not benefit remove grantees.

could fully internalize the costs of removing these now-unenforceable terms.[6]

This essay's innovative use of title covenants has a range of theoretical and practical implications.[7] For example, in keeping with recent legal scholarship, these self-help options underscore the point that valid common law contracts should never include unenforceable terms such as racially restrictive covenants.[8] Second, the essay's proposed use of various title covenants highlights an inconvenient truth: that too little attention is devoted to the possibility that unenforceable terms may discourage legal compliance.[9] And, third, these self-help options point out a hidden problem with the status quo: any failure to remove unenforceable terms, such as racially restrictive covenants, causes confusion about how the legal system actually works.[10]

I. INTRODUCTION

In 1945, Josephine Fitzgerald agreed to sell her St. Louis, Missouri home to J.D. and Ethyl Shelley.[11] After all of the essential parties signed a purchase

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[6] *See id*. at 806-7, explaining, in terms of the future covenant of further assurances, that:

> [It] … is a promise by the grantor to execute any additional documents that may be needed in the future to perfect the title which the original deed purported to convey. It is the only one of the six standard covenants … [which are present covenant of seisin, the present covenant of the right to convey, the present covenant against encumbrances, the future covenant of warranty, the future covenant of quiet enjoyment and the future covenant of further assurances] … that can be enforced by specific performance as well as damages … The three 'future' covenants … are breached only when the covenantee is actually disturbed by one with paramount title, and event termed as an 'eviction' even though it does not necessarily signify actual loss of possession. The statute of limitations commences only from the date of the eviction … And since no cause of action accrues until an eviction occurs, the unbreached covenant is held to run with the land and to benefit remote grantees.

[7] *Cf*. Meirav Furth-Matzkin, *The Harmful Effects Of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1067 (identifying, and providing possible ways to "overcome the deceptive power of unenforceable contract terms.").

[8] *Id*. (explaining that unenforceable terms should be avoided because they "contravene the law or misinform consumers about their legal rights and remedies.").

[9] *Id*. (explaining that recent work "studies the adverse effects of unenforceable terms.").

[10] *Id*. (explaining that, for example, "tenants reading contracts including unenforceable terms were substantially harmed, as they were about eight times more likely to bear costs that the law imposed on the landlord that were tenants with contracts containing enforceable terms.").

[11] *See Shelley v. Kraemer*, 334 U.S. 1 at Footnote 1 (1948), https://tile.loc.gov/storage-services/service/ll/usrep/usrep334/usrep334001/usrep334001.pdf (explaining that "title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership."). The fact that the Shelleys' agent concealed his ownership of the subject home was not an issue this case, but it still could provide the basis for an interesting follow-up essay

agreement for this home,[12] which was encumbered with a racially restrictive covenant that ostensibly prohibited transfers of any property interest to African Americans or Asian Americans,[13] each party to this presumably valid common law contract took most of the required steps to close the deal.[14] The only step not taken was enforcement of their racially restrictive covenant, as the Shelleys were African Americans and did not know about its existence.[15]

The other party to this restrictive covenant, who was a local homeowners' association, immediately took legal action.[16] The association was represented by Louis and Fern Kraemer, as nominal plaintiffs, in a Missouri state case.[17] The Kraemers argued that the seller's failure to enforce a racially restrictive covenant was legally compensable.[18] As such, they asked the court to reverse the already closed deal: in order to stop the Shelleys from taking possession.[19]

Missouri state courts had two (2) distinct legal responses to this litigation, which came to be known as *Shelley v. Kraemer*, 334 U.S. 1 (1948).[20] In the first instance, a Missouri trial court held this anti-Black and Asian term did not satisfy all of the requirements to be enforced.[21] The state high court had

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[12] *See generally* National Park Service, *Missouri: The Shelley House*, NPS.GOV, HTTPS://WWW.NPS.GOV/PLACES/MISSOURI-THE-SHELLEY-HOUSE-L.HTM (2023) (explaining that "this modest two-story masonry residence built in … 1906 … [and located at 4600 Labadie Avenue, St. Louis, Missouri 63115] … is associated with an African American family's struggle for justice that had a profound effect.").

[13] *See generally* University of Washington, Civil Rights And Labor History Consortium, Racial Restrictive Covenants Project, *Understanding Racial Restrictive Covenants And Their Legacy* (2023) (explaining that "the term racial restrictive covenant is used to describe several types of documents that property owners recorded with county auditor offices. The five most often found … are restrictions recorded in a plat, restrictions recorded in a separate document called a CC&R (Conditions, Covenants, Restrictions), restrictions in a homeowners' association (HOA) bylaws, restrictions established in a notarized petition by … property owners … [and] … a clause in an individual deed.").

[14] *See generally Shelley*, *supra* note 11 at 5 (explaining that "On August 11, 1945, pursuant to a contract of sale, petitioners Shelley … for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.").

[15] *Id*. at 5 (explaining that the Missouri "trial court found that petitioners … [Shelley] … had no actual knowledge of the restrictive agreement at the time of the purchase.").

[16] *Id*. at 6 (explaining that "On October 9, 1945, respondents … [Kraemer], as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis ... [seeking injunctive and declaratory relief].").

[17] *Id*. (same).

[18] *Id*. (explaining that the Kraemer's lawsuit asked "that petitioners Shelley be restrained from taking possession of the property and that judgment by entered divesting title out of petitioners … and revesting title in the immediate grantor or in such other person as the court should direct.").

[19] *Id*. (same).

[20] *Id*. at 1. The U.S. Supreme Court, however, also took this opportunity to deal with a related case, *McGhee v. Sipes*, which was on appeal from Michigan's highest state court.

[21] *Id*. at 6 (explaining that the trial court "denied the requested relief on the ground that

a different view and reversed its trial court.[22] The Supreme Court of Missouri, in doing so, held that the agreement was valid, enforceable and did not violate any protected interest then-recognized under the applicable law.[23] This final judgment remained in place until the U.S. Supreme Court granted certiorari.[24]

Writing on behalf of the federal high court in 1948, Justice Fred Vinson made the following findings in *Shelley*.[25] First, at least at the time of this decision, racially restrictive covenants were be considered valid common law contracts.[26] Second, these presumably valid contracts were not eligible to be judicially enforced due to their prohibited subject matters.[27] The reason for this partially adverse holding is judicial enforce of anti-Black contract terms would constitute state action in violation of the Fourteenth Amendment.[28]

What the U.S. Supreme Court failed to acknowledge is that its holding in *Shelley* also unjustifiably limited Black participation in a range of different real estate markets.[29] These limitations had related downstream costs, which

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the restrictive agreement … had never become final and complete because it was the intention of the parties … that it was not to become effective until signed by all property owners in the district and signatures of all the owners had never been obtained.").

[22] *Id*. (explaining that "The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief.").

[23] *Id*. (explaining that Missouri's highest "court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed … by the Federal constitution.").

[24] *Id*. at 1 (explaining that *Shelley v. Kraemer* and *McGhee v. Sipes* were granted cert).

[25] *Id*. at 4 (explaining that "Chief Justice Vinson delivered the opinion of the court.").

[26] *Id*. at 13 (explaining that the mere formation of racially restrictive covenants was not unlawful under the rule from *Shelley*.).

[27] *Id*. at 20 (explaining that any judicial enforce of racially restrictive covenants was unlawful under the rule from *Shelley*.).

[28] *Id*. at 23 (explaining that the reason that racially restrictive covenants could be formed, but not judicially enforced, is any such use of the courts would satisfy the state action requirement.). This essay contents that the state action in *Shelley* arose from the lower courts' exercise of jurisdiction over, and ordering enforcement of, contracts with prohibited subject matters. *But see* Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 94. Cal. L. Rev. 451, 452-3 (2007) explaining that:

> Shelley v. Kraemer… has proven to be a very difficult case to rationalize. The Fourteenth Amendment, on which the Shelley Court relied, long had been held to apply to state actors not individuals. Shelley did not purport to alter this, but where was the state action necessary for invoking the Fourteenth Amendment, given that the restrictive covenants were private contracts? The Court's answer … [, at least according to some U.S. legal scholars, arose from their theory that] … a contract's substantive provisions should be attributed to the state when a court enforces it … [, in other words, such scholars advance the theory that] … courts could enforce only those contractual provisions that could have been enacted into general law.

[29] *See generally* University of Washington, *supra* note 3 (explaining that "extreme disparities in homeownership … have everything to do with restrictive covenants and other instruments of exclusion that suppressed property ownership.").

are expenses that arise after the formation of a racially restrictive covenant.[30] One example of such a cost, which manifested itself in economic terms, is the fact African Americans received lower returns to capital than similarly situated people due to an inability to fully access home ownership markets.[31]

A related non-monetary example of a downstream cost is when racially restrictive covenants were used as a basis for preventing Black citizens from receiving any of the public or private subsidies that were freely awarded to similarly-situated White people.[32] Stated simply, these now-unenforceable terms deprived certain socially unpopular groups of economic opportunities. But, unfortunately, racially restrictive covenants also had a secondary set of impacts that too often goes unacknowledged: these now-unenforceable terms "stacked the deck against … African American home buyers for much of the 20th century keeping them confined to decaying urban neighborhoods."[33] One way that racially restrictive covenants achieved this goal is by providing a seemingly valid explanation for why Black folks were treated differently.[34]

The aforementioned downstream costs are not the only ones that may be fairly attributed to racially restrictive covenants.[35] For example, in terms of costs that could be expressed in economic or non-economic terms, political ones were generated by the fact that it was non-parties to these agreements that were most impacted by the widespread use of these now-unenforceable

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[30] *See*, *e.g.*, Missouri House Of Representatives Bill 1662, *supra* note 2 (outlining the "laws regarding restrictive covenants … [, which include limitations on recording some subsequent transfers, and] … expanding the definition of prohibited covenants.").

[31] *See generally* University of Washington, *supra* note 3 (explaining that "in the era (1940-1970) when home ownership became standard for White families, including those of modest incomes, families of color were shut out. And when restrictions finally began to ease, it was too late. Price appreciation … has meant that one … [now] … needs …a high income or property to exchange, or inter-generational wealth … to [buy] a home.").

[32] *Id*. (explaining that "restrictions narrowed buying opportunities in general and redlining prevent families from obtaining the loans and mortgages available in restricted neighborhoods.").

[33] Farrell Evans, *How Neighborhoods Used Restrictive Housing Covenants To Block Nonwhite Families*, HISTORY.COM (Dec. 15, 2022), https://www.history.com/news/racially-restrictive-housing-covenants.

[34] *See id*., explaining that:

> Racially restrictive covenants increased with the passage of the National Housing Act of 1934, which introduced the practice of redlining, which marked off areas that were risky to underwrite or guarantee mortgages. 'This practice provided a financial justification for racial restrictive covenants … [and] … made it exceedingly more difficult for non-whites to purchase property because financing was refused in the only neighborhoods they were able to live … [during that time].

[35] *Cf*. Carol M. Rose, *Property Law And Inequality: Lessons From Racially Restrictive Covenants*, 117 NORTHWESTERN L. REV. 225, 236 (identifying "some of the most prominent patterns in which racial covenants are still with us – in the land records, in the geography of segregation, in white anxiety about housing values, and in persistent economic inequality.").

terms.[36] An example of these downstream costs include the time, money and energy that was expended in passing the Fair Housing Act, which ended the practice of forming or performing racially restrictive covenants in the U.S..[37]

A third category of downstream costs, i.e., social ones, arose from the mere fact that racially restrictive covenants did not fully internalize all of their own expenses.[38] In other words, just as in the previous example, it was mostly non-parties that had to pay the difference between what was initially spent in adding these now-unenforceable terms to a purchase contract and/or related

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[36] *See generally* Evans, *supra* note 33, explaining that:

> the real estate industry … [conceptually] … reinforced racially restrictive covenants by … linking them to the stability of local markets … The federal government would adopt the policies of the real estate associations. Beginning in 1934, the Federal Housing Administration (FHA) recommended these discriminatory practices …. With the passage of the National Housing Act of 1934, which introduced the practice of redlining, which marked off areas that were risky to underwrite … 'Redlining made it exceedingly more difficult for non-whites to purchase property because financing was refused in the only neighborhoods they were able to live.' Such discriminatory governmental and market-based practices stacked the deck against the Shelleys and other African American home buyers.").

[37] *See generally* Fair Housing Act, Title VIII Of The Civil Rights Act Of 1968, P.L. 90-284 (Fair Housing Act as enacted and codified); *Cf.* 24 C.F.R. Section 100.60 (listing prohibited acts).

[38] The term, social costs, had been used most prominently by the Nobel Prize winner Ronald Coase. *See generally*, Amy Tikkanen, *Ronald Coase*, BRITANNICA (2023), https://www.britannica.com/biography/Ronald-Coase#ref239345, explaining that:

> Coase did pioneering work on the ways in which transaction costs and property rights affect business and society. In this most influential paper, 'The Problem Of Social Cost' (1960), he developed what later became known as the Coase theorem, arguing that when information and transaction costs are low, the market will produce an efficient solution to the problem of nuisances without regard to where the law places the liability for the nuisance. His work was a call to legal scholars to consider the process of bargaining about rights outside the context of litigation.

Unfortunately, it is difficult to find a situation in which information and transaction costs are low. So, in the late 1970s, Judge Guido Calabresi built on Coase's insights and introduced a way to improve results in various information/transaction cost scenarios. *See generally* Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi and Optimal Tax Liability*, 63 TAX L. REV. 797, 798 (2010), explaining that:

> The Coase Theorem is perhaps most influential for what it says about a world with transaction costs: That in such a world the assignment of legal entitlements (or the choice of legal rules) can affect overall efficiency… In his seminal book, The Cost Of Accidents: A Legal And Economic Analysis, Calabresi concluded that, assuming transaction costs prevent a Coasean result, the optimal tort liability regime is one that minimizes the sum of the costs of accidents and the costs of avoiding accidents, including the administrative costs of the tort system. Calabresi concluded that such a regime will sometimes call for assigning tort liability to the 'cheapest costs avoider' – that is, to the party able to minimize negative externalities (or third-party harms) most efficiently. We refer to this party as the cheapest cost … avoider.

documents[39] and what it cost subsequent owners to deal with such terms over time.[40] One example of these often-unaccounted for social costs are the difficulties that Black Americans have long-experienced in negotiating, and in completing, deals on the same terms as similarly-situated White people.[41]

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[39] Examples of the modest costs that were born by the original parties to a racially restrictive covenant are the costs of securing a limitation on each property owner's right to transfer and the money that were spent on agents that assured all legal requirements were met. *Cf*. University of Washington, *supra* note 3 (identifying specific examples of these costs, along with related ones that continue to be generated over time, such as "biased 'steering' by realtors, discriminatory behavior by parties selling or renting properties, stares and snubs by neighbors have continued to block access through the years … [that imposed transaction costs upon non-parties].").

[40] Among that costs that need to be accounted for are the obvious economic ones, such as lawyer fees and related expenses, and non-economic costs that may be less apparent. Potential examples are reputational costs and/or any existential harms arising from when a property owner's ideals are out-of-step with their actions, such as when a person that believes that they are "non-racist" is forced to accept that fact that they benefit from current and past racially discriminatory policies. Another, but perhaps less concrete, example is when a person that views themself as "non-racist" is shown to have racially discriminatory ideas about who is worthy of receiving key public goods and/or services. *See generally* Christian Léonard and Christian Arnsperger, *You'd Better Suffer For A Good Reason: Existential Economics And Individual Responsibility In Health Care*, 10 REVUE DE PHILOSOPHIE ECONOMIQUE 125, 125 (2009), explaining that:

> The aim of this paper is to bring a specific approach, called existential economics, to bear on issues of collective distribution of health care and of personal responsibility in health policies. We intend to show that this approach offers new tools for the critical analysis of the notion of responsibility in health care and opens up new normative horizons for a society structured by existentially lucid 'care'…

[41] *See generally* Randall K. Johnson, *Ella P. Stewart And The Benefits Of Owning A Neighborhood Pharmacy*, 8 ADMIN. L. REV. ACCORD 101, FN 75 (2023), explaining that:

> even though there has been a marked decline in the overt racism that is directed at African-Americans, a range of public accommodations and common carriers continue to be accused of unequal treatment of African Americans despite clear prohibitions on such discrimination under U.S. federal, state, and local laws. See, e.g., City of Kansas City, Missouri, Discrimination Report, Work Order #1375965, Public Accommodations in KCMO City Limits, Osteria Il Centro, Date Submitted: 02/05/23. Similarly, a study of the Transportation Security Agency (TSA), found that "its officials engaged in [unlawful] profiling. At Newark Liberty International Airport in New Jersey, a supervisor . . . instructed profiling of passengers based on race and made improper law enforcement referrals to Customers and Border Protection." Spencer Ackerman, TSA Screening Program Risks Racial Profiling Amid Shaky Science – Study, THE GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/us-news/2017/feb/08/tsa-screening-racial-religious-profiling-aclu-study (internal quotations omitted). Chicago O'Hare International Airport has received similar complaints about the same type of unlawful anti-Black discrimination recent years. See, e.g., U.S. Department of Transportation, Office of Consumer Protection, Case Number KS2021120208, Complaint Code LZ0099, Carrier Name: TSA, Date: 01/20/20.

U.S. governments, increasingly, have recognized that downstream costs continue to be generated by racially restrictive covenants.[42] In response, some jurisdictions have put in place reforms that seek to partially internalize these current downstream costs.[43] These reforms, often, use three (3) approaches: concealment of these now-unenforceable terms, contextualization of racially restrictive covenants or redaction of these racially discriminatory terms.[44] An illustrative example of the redaction approach is what Missouri did in 2022.[45]

But what no one has done, at least as of this writing, is show how current successors in interest may limit the creation of additional downstream costs through self-help.[46] By definition, self-help is any attempt to enforce a right without using the formal legal system.[47] Self-help alternatives to the status quo, especially in supposedly more progressive states, are readily available

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See generally Randall K. Johnson, *What Is The Optimal Basis For Imposing Tax Liens*, 2023 ILL. L. REV. ONLINE 130, FN 75 (2023) (identifying a recent study that shows "foreclosure rates vary for debtors, even similarly-situated ones, based upon irrelevant characteristics such as a debtor's physical characteristics."); *See generally* Christophe Henkel & Randall K. Johnson, *Why U.S. States Need Their Own Cannabis Industry Banks*, 101 WASH. U. L. REV. ONLINE _, FN 18 (2023) (identifying a recent case that explains "the broad political implications of marijuana possession and criminalization … [for African Americans that fully obey the law] … in Michigan."); *See generally* Randall K. Johnson, *Frederick Douglass And The Hidden Power Of Recording Deeds*, 95 S. CAL. L. REV. POSTSCRIPT 54, FN 88 (2022) (identifying recent situations "wherein Black property owners are unjustifiably offered less, in terms of purchase price or bargaining power, than similarly-situated white owners in arms-length deals.").

[42] *See generally* Oskar Rey, *The Lasting Impacts Of Discriminatory Restrictive Covenants*, MRSC (Apr. 12, 2021) (explaining that "undoing the effects of these discriminatory practices has been an exceedingly slow and arduous process.").

[43] *Id*. (explaining that, "in 1987, the Washington State Legislature adopted RCW 49.60.227, giving property owners a process that allowed them to seek a court order under which discriminatory covenants could be "stricken" from the public record … In 2018, the legislature then added an alternative process under which a property owner could file a "restrictive deed modification document" that strikes the portions of a covenant voided … [under applicable laws … In 2021, it went even further by allowing discriminatory covenants to be removed from a parcel's chain of title (E2SHB 1335)].").

[44] Only one of the three (3) options for removing racially restrictive covenants are effective in eliminating any possibility that parties might improperly rely upon racially restrictive covenants, which is redaction. *See generally* Scott Tong and Serena McMahon, *The Legacy Of Racist Housing Covenants And What's Being Done To Eradicate Them In Home Deeds*, MBUR (Sep. 14, 2021) (explaining the "three different strategies … One is concealment – title companies stop reporting covenants … Another is to contextualize the covenant but make it clear they are no longer enforceable … The third way is by redacting the covenant … [by] … cutting … [racist] … language out.").

[45] *See generally* Missouri House of Representatives Bill 1662, supra note 2.

[46] *See generally* Merriam-Webster Dictionary, *supra* note 1.

[47] *See generally* Merriam-Webster Dictionary, *Self-Help*, MERRIAM-WEBSTER.COM (2023) (defining the term to mean "the action or process of … overcoming one's problems … without the aid of others.").

and come at little-to-no cost.[48] Examples include pre-closing negotiations to remove racially discriminatory terms or post-closing use of future title covenants to do the same thing and/or other work to set the record straight.[49]

This essay does its work in the following three (3) parts (Parts II-IV). Part II describes the applicable law for racially restrictive covenants in the wake of *Shelley*.[50] Part III contains positive and normative analysis concerning the downstream costs that are, currently, being generated by racially restrictive covenant.[51] Part IV is the conclusion, which includes an implementation plan.

II. APPLICABLE LAW

Under the common law of contracts, a valid and enforceable agreement usually requires 1) an offer by one party,[52] 2) acceptance by the other party,[53] 3) consideration by both of the parties,[54] 4) the absence of a viable defense or privilege to contract formation[55] and 5) the absence of a viable defense or

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[48] *See generally* Rebecca Rivas, *New Missouri Law Mandates Removal Of Discriminatory Covenants Form Property Deeds*, MISSOURI INDEPENDENT (Jun. 2030, 2022) (explaining that "Missouri joins a handful of states that have recently enacted laws to remove such covenants form property records, following Maryland, California, Illinois, Connecticut and Virginia.").

[49] *See generally* Whitman, *supra* note 1 at 801 (explaining that "it is customary in most areas of the nation for the grantor in an ordinary sale transaction to include covenants regarding the title. A deed containing such covenants is … a 'warranty deed…").

[50] *See generally* Shelley, *supra* note 11 (describing the facts, and the law, in this seminal case about racially restrictive covenants).

[51] *See generally* Rose, *supra* note 35 at 236 (outlining several current downstream costs).

[52] *See generally* Joseph M. Perillo, CONTRACTS 30 (Seventh Edition, 2019) (explaining that "an offer, with minor exceptions…, is a promise to do or refrain from doing some specified thin the future conditioned on the other party's acceptance.").

[53] *Id*. at 66 (explaining that "acceptance has been defined as 'a voluntary act of the offeree whereby [the offeree] exercises the power conferred … by the offer and thereby creates the set of legal relations called a contract.'").

[54] *Id*. at 158-9, explaining that;

> three elements must concur before a promise is supported by consideration … [1) the promise must incur legal detriment, 2) this detriment must induce the promise and 3) the promise must induce the detriment] ... When these three elements coexist in the facts, there is a 'bargained for exchange,' a binding transaction.").

[55] *See generally* Lexis.com, *Excuses For Nonperformance: Conditions Preceding Contract Formation* (2023), https://plus.lexis.com/document?crid=c0201c89-f981-49df-98d2-5ddcf9d7ac50&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5PN3-6RK1-JC0G-612R-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=500749&pdmfid=1530671&pdisurlapi=true (explaining that "contractual obligations may be excused as a result of situations existing prior to contract formation including: mistake, misunderstanding, fraud, illegality, duress and undue influence … [or] … lack of capacity.").

privilege to contract enforcement.[56] In certain cases, additional requirements also need to be met such as when the contract involves real estate transfers.[57]

A restrictive covenant, which is a voluntary agreement that purports to limit how subsequent owners use their property, is a potentially valid type of common law contract.[58] These common law contracts, which run counter to the general rule that ownership interest may be freely transferred, often are put into place to advance specifically socially beneficial goals.[59] Examples of these socially benefit goals include situations wherein a common interest communities imposes maintenance requirements to protect the health, safety or general welfare of the owners of condominium and/or co-operative units.[60]

But when valid restrictive covenants include discriminatory terms, U.S. courts allow subsequent owners of the encumbered real property to challenge

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[56] *See generally* Lexis.com, *Excuses For Nonperformance: Conditions Following Contract Formation* (2019), https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-excuses-for-nonperformance.pdf (identifying "excuses that develop after contract formation, such as failure of a condition, supervening events, impossibility, impracticability, frustration of purpose, anticipatory repudiation, and later agreements between the parties (including modifications, waivers, rescissions, and accord and satisfactions.").

[57] *See generally* Perillo, *supra* note 52 at 681-2, stating the Statute of Frauds applies to:

> certain kinds of contracts and imposed a writing requirement. The selected agreements had to be in writing, or alternatively, a note or memorandum of the agreement sufficed. The agreement or memorandum had to be 'signed by the party to be charged' or the party's agent. Section 4 … [of the original version of the law] … singled out for the writing requirement … 1) a promise by an executor or administrator to answer in damages out of his or her own estate; 2) a promise to answer for the debt, default or miscarriage of another person; 3) a contract made in consideration of marriage; 4) a contract for the sale of land or interest in land; 5) a contract that is not to be performed within the space of one year from the making thereof. Section 17 imposed a similar requirement for the sale of goods … While the equivalent of Section 4 is on the books in almost every American jurisdiction, the provision regarding the sale of goods … [i.e., Section 17] … has been thoroughly revamped by the UCC.

[58] *See generally* Whitman, *supra* note 1 at 387, explaining that

> a 'covenant' is a promise by one person to another to do (or to refrain from doing) something, which promise the covenantee may enforce legally against the covenantor. The covenants we consider here have the peculiar quality of 'running with the land,' i.e., they bind not only the covenantor and covenantee, but also persons who subsequently acquire an interest in a parcel or parcels of land previously owned by the covenantor or covenantee. One should appreciate that a covenant has two 'sides' to it. The covenantor's side (the 'burden' side) is a duty to do or to refrain from doing, as promised. The covenantee's side (the 'benefit' side) is the right to have the duty performed.

[59] *Id*. at 406 (explaining that "because running covenants impose restrictions on the use and enjoyment of the burdened land, they are 'clouds' on title to that land.").

[60] *Id*. (explaining that restrictive covenants make a property's "title less marketable, in tension with the law's long-established policy in favor of land's alienability.").

the formation and/or performance of these provisions.[61] Illustrative examples of discriminatory terms, at least as of this writing, are "clauses that prohibit the ownership, occupancy, or use of land based upon a particular trait, such as race."[62] Among the most frequently used provisions are racially restrictive covenants, which are discriminatory terms that prohibit subsequent property owners from transferring any interest in their land to African Americans or other socially unpopular groups like Asian Americans or Jewish Americans.[63]

Racially restrictive covenants, as of this writing, have been prohibited by a range of U.S. statutory, administrative and decisional laws.[64] But this prohibition has not always been in place, as these now-unenforceable terms have held several different legal statuses.[65] These statuses have ranged from being valid and enforceable to invalid and unenforceable, based on how courts viewed racially restrictive covenants between the 1890s and 1960s.[66]

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[61] *See generally* Perillo, *supra* note 52 at 771 (explaining that, according the first Restatement of Contracts, "a bargain is 'illegal' … if either its formation or its performance is criminal, tortious or otherwise opposed to public policy … [whereas] … The Restatement (Second) avoids the term 'illegal' and subsumes all such unenforceable bargains under the amorphous but ubiquitous concept of 'public policy,' the 'unruly horse' of the law."). This essay employs the definition from the second Restatement.

[62] Fannie Mae, *Restrictive Covenants: What Are Discriminatory Restrictive Covenants?*, FANNIEMAE.COM (2023), https://www.fanniemae.com/about-us/what-we-do/homeownership/restrictive-covenants.

[63] *See* Cheryl W. Thompson, Christina Kim, Natalie Moore, Roxana Popescu & Corinne Ruff, *Racial Covenants, A Relic Of The Past, Are Still On The Books Across The Country*, NPR, https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination (Nov. 17, 2021) (explaining that "most of the covenants throughout the country were written to keep Black from moving into certain neighborhoods.").

[64] *See generally* Fair Housing Act, supra note 37 (Fair Housing Act as enacted and codified); *Cf.* 24 C.F.R. Section 100.60, supra note 37 (listing prohibited acts); *See* Fair Housing Center Of Greater Boston, *Historical Shift From Explicit To Implicit Policies Affecting Housing Segregation In Eastern Massachusetts*, THE FAIR HOUSING CENTER OF GREATER BOSTON, https://www.bostonfairhousing.org/timeline/1968-Fair-Housing-Act.html (Nov. 17, 2021), explaining that:

> Title VIII of the Civil Rights Act Of 1968, the Fair Housing Act … prohibits discrimination by direct providers of Housing … as well as other entities. Discrimination in other housing related activities … is also covered. As a result of this legislation, the … writing of racially restrictive covenants into deeds … [was] … deemed illegal.

[65] *See generally Shelley*, *supra* note 11 (describing the issues presented in *Shelley*).

[66] *See* Dawn Bauman, *An Unfortunate Legacy: A Brief History Of Racially Restrictive Covenants*, COMMUNITY ASSOCIATION INSTITUTE, https://advocacy.caionline.org/history-of-racially-restrictive-covenants/ (Feb. 18, 2021) (explaining that "racially restrictive covenants first appeared in deeds of homes in California and Massachusetts at the end of the 19th century and where then widely used throughout the U.S. in the first half of the 20th century.").

For example, prior to 1948, if all the required elements were met to form a viable common law contract, then racially restrictive covenants were judicially presumed to be valid and enforceable.[67] *Shelley v. Kraemer*, then, moved racially restrictive covenants away from its initial legal status (i.e., legally recognized, as common law contracts, and eligible to be enforced by courts), and moved them into an intermediate position (i.e., legally recognized as common law contracts that, nonetheless, could not be judicially enforced).[68] Subsequently, the 1968 Fair Housing Act moved these racially discriminatory terms away from an intermediate position and into its current one (i.e., not capable of being legally recognized nor judicially enforced).[69]

For purposes of this essay's discussion, as it is part of a 2023 symposium on the *Shelley* case, a focus will be placed upon the legal status of racially restrictive covenants between 1948 and 1968.[70] This legal status, largely, was determined by the U.S. Supreme Court's response to three (3) key issues that were presented in the *Shelley* case:[71] 1) did the proponents of the two racially restrictive covenant do enough for each agreement to be legally recognized as a valid common law contract?[72] 2) if the answer is "yes," then did the proponents do enough for each agreement to be judicially enforced?[73] And 3) did the challengers raise a valid defense, or privilege, to their enforcement?[74]

With respect to the first issue that was presented, the U.S. federal high court unanimously held that if all requirement are met to create a "… [racially] … restrictive agreements, … [then] … standing alone, [these common law contracts] … cannot be regarded as violative of any rights … … guaranteed … by the Fourteenth Amendment."[75] Stated simply, due to the fact that each of the required elements were met to create a valid common law contract, and there were no valid defenses to formation, the proponents

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[67] *See generally* Whitman, supra note 1 at 389-90 (implying that a legally-valid racially restrictive covenant requires an offer, acceptance, consideration on both sides, no defenses to contract formation and no defenses to contract formation).

[68] *See generally Shelley*, *supra* note 11 at 23 (explaining that restrictive covenants could be formed, but not judicially enforced in the wake of *Shelley*).

[69] *See generally* Fair Housing Center Of Greater Boston, *supra* note 64 (describing the fact that restrictive covenants could neither be formed nor judicially enforced in the wake of the Fair Housing Act).

[70] *See generally* Kansas Law Review Symposium, *supra* note 1 (describing the range of topics to be considered by legal scholars on the seventy-fifth anniversary of *Shelley*).

[71] *See generally Shelley*, *supra* note 11 at 23 (describing the court's holding in *Shelley*).

[72] *Id*. at 13 (asking whether formation of racially restrictive covenants was unlawful).

[73] *Id*. at 20 (asking if judicial enforcement of racially restrictive covenants was unlawful).

[74] *Id*. at 23 (asking whether the formation and judicial enforcement of racially restrictive covenants satisfies the state action requirement making constitutional claims available).

[75] *Shelley*, *supra* note 11 at 13.

of these challenged agreements met their burden of proof/production.[76] And, thus, racially restrictive covenants could continue to be formed in the future.[77]

As for the second and third issues that were presented, the Court held that "in granting judicial enforcement of the restrictive agreement in these cases, the states have denied petitioners the equal protection of the laws and that, therefore, the actions of the state courts cannot stand."[78] In other words, the proponents of these racially discriminatory terms did not prevail with respect to either the second or third issues: as a valid defense to performance was raised by the challengers in this case.[79] And, therefore, racially restrictive covenants may be validly created, but cannot be enforced by U.S. courts.[80]

The three (3) key take-aways from *Shelley* were the following.[81] First, the parties to a real estate contract could lawfully include racially discriminatory terms.[82] And, subsequently, these contracting parties may enforce agreements through social means.[83] But, finally, judicial enforcement was unavailable.[84]

III. ANALYSIS

In the wake of *Shelley*, some jurisdictions saw increases in their overall number of racially restrictive covenants.[85] In St. Louis County, for example, another one hundred (100) racially-restrictive covenants were created after

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[76] *See id*. (describing the first of the two major holdings in *Shelley*, i.e., that racially restrictive covenants are valid common law contracts and may be lawfully formed).
[77] *Id*. (same).
[78] *Shelley*, *supra* note 11 at 20.
[79] *Id*. (describing the second of the two key holdings in *Shelley*, i.e., racially restrictive covenants, as a rule, may be lawfully formed but cannot be judicially enforced in court).
[80] *Id*. (same).
[81] *See generally Shelley*, *supra* note 11 at 23. (identifying the overall holding in *Shelley*).
[82] *Id*. (same).
[83] *See generally* University of Washington, *supra* note 3 (explaining that "white-only neighborhoods continued to enforce their covenants by other means … [such as when,] … in 1958, a mixed-race couple who had brought a property in the University District of Settle, gave up and moved away after a cross was burned on their front yard … [and no one did anything to hold the criminals to account].").
[84] *See generally Shelley*, *supra* note 11 at 23.
[85] *See generally* Corinne Ruff, *80% Of St. Louis County Homes Built By 1950 Have Racial Covenants, Researcher Finds*, ST. LOUIS PUBLIC RADIO, https://www.stlpr.org/culture-history/2022-01-26/80-of-st-louis-county-homes-built-by-1950-have-racial-covenants-researcher-finds (Jan. 31, 2023), explaining that:

> In St. Louis County more than 1,000 individual covenants were put in place … in the 1920s and 1930s, except during the Great Depression when developers were not building new homes … Developers continued to add racial covenants in the late 1940s … [and] … at least 100 covenants were put into place after … [*Shelley*].").

1948.[86] These racially discriminatory terms continued to be added until 1968, at which point the Fair Housing Act outlawed insertion of such provisions.[87]

Ostensibly, the U.S. Congress used the Fair Housing Act to create a range of new legal protections in response to the Civil Rights Movement.[88] But, in reality, many of these "new" protections already had been made available under previously enacted federal laws.[89] One example is the Civil Rights Act of 1866, i.e., 42 U.S.C. Section 1982, which guaranteed that Black folks had a right to buy, sell, hold or rent property on the same terms as other citizens.[90]

So, why was the Fair Housing Act even needed?[91] The short answer is racial discrimination victims rarely invoked the Civil Rights Act of 1866 or other related laws.[92] The main reason was victims' inability to fully satisfy the state action requirement.[93] This requirement, traditionally, called for each victim of racial discrimination to show that a U.S. government actively assisted a third-party tortfeasor that singled out victims for adverse treatment based upon their belonging to a suspect classification and/or quasi-suspect classification.[94] These elements were not met when a private party, acting on its own and without the support of a government, violated a victim's rights.[95]

Building on a series of then-contemporary cases, which challenged the

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[86] *Id*. (providing data from one jurisdiction, St. Louis, Missouri, and its relative increase).
[87] *See generally* Fair Housing Center Of Greater Boston, *supra* note 64 (describing the scope of the Fair Housing Act and the fact that adding racially restrictive covenants to deeds, among other discriminatory acts, became a prohibited activity under this statute).
[88] *Id*. (same).
[89] *See generally* Stephen J. Pollak, *1968 And The Beginnings Of Federal Enforcement Of Fair Housing*, United States Department Of Justice (DOJ), https://www.justice.gov/crt/1968-and-beginnings-federal-enforcement-fair-housing1 (Feb. 1, 2000) (explaining that "prior to April 1, 1968, the … [DOJ] … had done virtually nothing to address the problem of discrimination in housing. I recall no action to support enforcement of Executive Order 11063 and, surprisingly, no action to enforce title VI of the Civil Rights Act of 1964 … One major exception to this record of inaction was support given to the resuscitation of the Civil Rights Act of 1866.").
[90] *Id*. This question is asked rhetorically, as the previous footnote explains its necessity.
[91] *See generally* 42 U.S.C. Section 1982 (explaining that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").
[92] Beginning in the early 1960s, an increased number of victims that were not deterred. *See, e.g.,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (finding that when the actions of a government are so entwined with actions of a private party, then it is fair to hold that government to account for what is done by the private party), *See, e.g.,* Evans v. Newton, 382 U.S. 296 (1966) (finding that when traditional government functions are turned over to a private party, then the U.S. federal Constitution applies to the actions of that private party); *See, e.g.,* Evans v. Abney, 396 U.S. 435 (1970) (same).
[93] *See generally* Stephen J. Pollak, *supra* note 89 (explaining the need for the 1968 Fair Housing Act and the failure of previously-enacted federal law to deter wrongdoing).
[94] *Id*. (same).
[95] *Id*. (same).

long-standing view of what constituted state action,[96] the Fair Housing Act expressly prohibited the inclusion of racially discriminatory terms in real estate purchase contracts, rental agreements and housing advertisements.[97] The most interesting of these federal prohibitions, at least for purposes of this discussion, are the bans on racist terms in deeds and/or related documents.[98]

Just like with *Shelley,* the federal government's modest attempt at protecting African Americans and other socially unpopular groups through its passage of the Fair Housing Act was immediately undermined by both Democrats and Republicans alike.[99] For example, every single presidential administration between 1968 and the present has sanctioned only a small subset of the property owners that engaged in unlawful discrimination.[100] One administration even pushed out one of its own cabinet secretaries, once it became clear that he intended to hold more property owners to account.[101]

Within this context, there is a lot more work to be done in the wake of the seventy-fifth (75th) anniversary of *Shelley*.[102] One way to carry out this work is by urging more successors in interest to racially restrictive covenants to use title covenants as a way to internalize certain downstream costs more fully.[103] In some cases, the present covenant against encumbrances may be used to limit the costs of removing racially restrictive covenants.[104] Whereas in other

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[96] *Id*. (same).

[97] *See generally* Fair Housing Center Of Greater Boston, *supra* note 64 (explaining the FHA's scope).

[98] *See generally* Kansas Law Review Symposium, *supra* note 1.

[99] *See generally* Janell Ross, *A Rundown Of Just How Badly The Fair Housing Act Has Failed*, WASHINGTON POST, https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/ (Jul. 10, 2015) (explaining that "around the country, many cities have evaded and flat-out rejected their responsibility to 'affirmatively' advance integration and the Fair Housing Act's other goals.").

[100] *Id*. (explaining that "HUD has, in many cases, continued to send federal housing dollars … [to jurisdictions, both Democratic and Republican-dominated,] … despite their non-compliance.").

[101] *Id*. (explaining that former Michigan Governor George "Romney was determined to … withhold federal funds form communities that fought desegregation, but Nixon took clear steps to stop him.").

[102] *See generally* Kansas Law Review Symposium, *supra* note 1.

[103] *Cf*. Whitman, *supra* note 1 at 801 (explaining that "deed covenants are not a highly effective means of title assurance. They depend on the convenantor's continued solvency and availability for suit, and recovery under them is seriously limited.").

[104] *See id*. at 804-6, explaining, in terms of the present covenant against encumbrances:

> an encumbrance is some outstanding right or interest in a third party which does not totally negate the title which the deed purports to convey. Typical encumbrances include mortgages, liens, easements, leases and restrictive covenants … [as one of the] … three 'present' covenants … [this limited warranty will be] … breached, if at all, the moment the deed is delivered and accepted … The statute of limitations begins to run against the grantee at the time, and thus may bar any claim before the

situations, such as when present title covenants are not available due to the fact that a closing has taken place, a future covenant of further assurances can be used to internalize the cost of removal and/or other consequential losses.[105]

It is well-established that there are several ways for a buyer to protect themself from the various downstream costs that arise from a seller's incorrect statements about the type, quality and quantity of property title on offer. The three (3) traditional ways to do this work is by hiring a lawyer to take a close look at public records about the subject property, purchasing a title insurance policy or using contract law to limit the possibility of any hidden title defects. Regardless of the option that is selected, all three ways provide buyers with title assurance in cases wherein a seller conveys a less-than-marketable title.

For example, in cases wherein the parties to a valid purchase contract want to use contract law to carry out this work, the marketable title doctrine may be available. This property law doctrine, which applies prior to a deal's closing, protects buyers from certain types of harms that arise from sellers' invalid representations. In contrast, present title covenants insulate buyers from injuries generated by sellers' invalid certifications. Lastly, future title covenants protect buyers from harms arising from sellers' invalid warranties.

By way of illustration, a current successor in interest could voluntarily agree to provide a certification that no racially restrictive covenants is present as of the home closing date (i.e., when the contracted-for property interest is transferred to a bona fide purchaser for value in exchange for valuable consideration). The negotiation of such an express present covenant against encumbrances internalizes, on a prospective basis, the downstream costs of racially restrictive covenants. And it likely prevents the generation of new downstream costs such as the time, money and energy that property owners too often expend in dealing with pre-existing racially discriminatory terms.

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grantee even discovers the title is defective. Moreover, the present covenants are usually held not to 'run with the land' and hence do not benefit remove grantees.

[105] *See id*. at 806-7, explaining, in terms of a future covenant of further assurances, that:

> [It] … is a promise by the grantor to execute any additional documents that may be needed in the future to perfect the title which the original deed purported to convey … The three 'future' covenants … are breached only when the covenantee is actually disturbed by one with paramount title, and event termed as an 'eviction' even though it does not necessarily signify actual loss of possession. The statute of limitations commences only from the date of the eviction … And since no cause of action accrues until an eviction occurs, the unbreached covenant is held to run with the land and to benefit remote grantees.

This author has focused on consequential losses here, as well as elsewhere, as a way to underscore the fact that such damages frequently arise and need to be accounted for more fully. *Cf.* Randall K. Johnson, *Why Illinois Should Reevaluate Its Video Tolling Subsidy*, 106 IOWA L. REV. 2303 (2021) (explaining that the failure to timely pay a toll has multiple downstream costs, which, may be expressed in dollar terms and could turn into unjustified public subsidies when scofflaws are not held to account by government).

This first self-help option does its work, specifically, by encouraging the parties to such negotiations to fully identify the downstream costs arising from the removal of racially discriminatory terms. And, shortly thereafter, decide upon an economic offset as part of the final home purchase price. The deal that is reached by such a buyer and seller could be properly papered up by a lawyer, at least in most states, through use of a properly drafted waiver.

Alternately, in the event that a racially restrictive covenant has somehow survived the closing of a real estate deal that transferred marketable title through the use of a warranty deed, it might be possible to invoke the covenant of further assurances as a way to partially internalize the costs of racially discriminatory terms. This express future covenant is intended to protect buyers from various expenses that arise from the removal of any pre-existing title defects.[106] It does so, specifically, by requiring that the seller of a property encumbered with a racially restrictive covenant take all reasonably necessary steps, on behalf of the buyer, to cure any title defect after closing.[107]

This second self-help option does its work in a similar manner to the first one. Specifically, it calls for buyers and sellers to identify the downstream costs of removing racially restrictive covenants and along with consequential damages that are generated by failing to do this work prior to their closing.[108] At this point, the parties could decide upon an economic offset or create a plan for the seller to carry out this work on behalf of the buyer. Whatever deal is ultimately reached by a buyer and seller, this compact could be fully protected through the parties' execution of a properly drafted warranty deed.

It is an open question if racially restrictive covenants are considered title defects, as of this writing, but it is clear that some courts are moving in that direction.[109] This fact is evidenced by the language used in Missouri's new racially restrictive covenant statute, Missouri House of Representatives Bill 1662, which implies that such legal treatment may be a distinct possibility.[110]

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[106] *See generally* Whitman, *supra* note 1 at 806-7.

[107] *Id*. (same).

[108] *See generally* Dan B. Dobbs & Caprice L. Roberts, THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 231 (Third Edition, 2018) (explaining that consequential damages are "damages consequent upon but distinct from harm to plaintiff's entitlement.").

[109] *Cf*. Whitman, *supra* note 1 at 809, identifying types of breaches and recovery rules:

> Where the breach is not a deficiency in land area, but instead the property is subject to an encumbrance such as an easement or restrictive covenant that has not been removed by the grantee, the cases allow recovery for the diminution in value of the land, subject to the absolute limitation that damages may not exceed the total price.

[110] *See generally* Missouri House of Representatives Bill 1662, *supra* note 2, describing:

> 442.403 (3). No deed recorded on or after August 28, 2022, shall contain a reference to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property as prohibited under subsection 1 of this section. A recorder

This statute states, in relevant part, that failure to remove every single racially discriminatory terms does not void an otherwise valid transfer of property.[111] But, as this law takes care to say in express terms, the continued presence of racially restrictive covenants may prevent the recording of such a transfer.[112]

Within this context, the additional downstream costs that are generated by being barred from recording come into full view. For example, it is well-established that property transfers that are not promptly recorded may run the risk of becoming unmarketable. By use of this term, the essay refers to the idea that the "title … [that most buyers want to purchased is one] … reasonably free from doubt as to its validity … [i.e., one that allows for them to subsequently transfer the same] … property without fear of litigation."[113]

A secondary cost that arises from being prohibited from recording is that a buyer may lose out to a bona fide purchaser for value, especially in terms of their priority to the subject property.[114] By definition, a bona fide purchaser is anyone that "acquires title without notice of an adverse claim and pays … [the seller] … valuable consideration."[115] In cases wherein a bona fide purchaser registers their competing claim before the first buyer does the same, usually by doing what is required to record the second transfer of title, they gain superior title to a property that was transferred twice by the seller.[116]

When these two (2) additional types of downstream costs are added to the other ones that are already generated by racially restrictive covenants under Missouri House of Representatives Bill 1662, or voluntarily by property owners in a less-regulated jurisdiction, it becomes clear why more successors

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> of deeds may refuse to accept any deed submitted for recording that references the specific portion of any such restrictive covenant. The person who prepares or submits a deed for recording has the responsibility of ensuring that the specific portion of such a restrictive covenant is not specifically referenced in the deed prior to such deed being submitted for recording. A deed may include a general provision that states that such deed is subject to any and all covenants and restrictions of record; however, such provision shall not apply to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property as prohibited under subsection 1 of this section. Any deed that is recorded after August 27, 2022, that mistakenly contains such a restrictive covenant shall nevertheless constitute a valid transfer of real property.

[111] *Id*. (explaining that "Any deed that is recorded after August 27, 2022, that mistakenly contains such a restrictive covenant shall nevertheless constitute a valid transfer of real property.").

[112] *Id*. (explaining that "A recorder of deeds may refuse to accept any deed submitted for recording that references the specific portion of any such restrictive covenant.").

[113] Sprankling, *supra* note 4 at 510,

[114] *See generally* Sprankling, *supra* note 4 at 558-9 (explaining one legal effect of failing to record property interests in their proper place, which is usually a Recorder of Deeds).

[115] Sprankling, *supra* note 4 at 559.

[116] *See generally* Sprankling, *supra* note 4 at 569 (explaining one legal effect of failing to record property interests in their proper place, which is usually a Recorder of Deeds).

in interest should use self-help. First, these current property owners may avoid the downstream costs of removing racially restrictive covenants before, during or after a deal's closing. These successors in interest also, potentially, avoid related consequential losses such as amounts spent in negotiating offsets from sellers that convey less-than-marketable titles.[117] Lastly, these current property owners may avoid other consequential losses such expenses arising from their lost priority due to the existence of bona fide purchasers.[118]

IV. CONCLUSION

To review, the essay does its work by encouraging more successors in interest to internalize their own downstream costs by making use of self-help options like present and future title covenants.[119] In some cases, the present covenant against encumbrances may be used to limit the costs of removing racially restrictive covenants.[120] Whereas in other situations, wherein present title covenants are not available due to the fact that a closing has taken place, the future covenant of further assurances limits the very same type of costs.[121]

Such an innovative use of these self-help options has both theoretical and practical implications.[122] For example, in keeping with recent contract law scholarship, each self-help option underscores the point that valid common law contracts should never include any racially restrictive covenants.[123] It is well-established that unenforceable terms are found in a variety of contract settings, which often are tolerated due to the extremely high costs of detecting their presence.[124] But in cases in which an unenforceable term is easy to identify, such as when a racially restrictive covenant singles out certain racial groups for adverse treatment without adequate justification, there is no reason to allow this less-than-true information about contracts into the public record.

Second, these self-help options highlight an inconvenient truth: too little

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[117] *See generally* Dobbs, *supra* note 108 at 811 (defining consequential damages as "those claimed to result as a secondary consequence of defendant's non-performance.")

[118] *Id*. (same).

[119] *See generally* Whitman, *supra* note 1 at 806-7 (describing all six types of covenants).

[120] *Id*. at 804-6. (describing one type of present covenant, the covenant against encumbrances).

[121] *Id*. at 806-7 (describing one type of future covenant, the covenant of further assurances).

[122] *See generally* Furth-Matzkin, *supra* note 7 at 1035 (identifying, and providing possible ways to overcome "the role that … [unenforceable contract] … terms play in shaping tenants' post-contract decisions and behavior.").

[123] *Id*. at 1066 (explaining that tenants, and consumers more generally, are prone to relinquish their legal rights and remedies as a result of the misinformation conveyed in the unenforceable fine print.").

[124] *Id*. (explaining that there is "accumulating evidence that the inclusion of unenforceable contract terms … is prevalent in consumer markets.").

attention has been devoted to the possibility that unenforceable terms may discourage compliance with the law.[125] A possible explanation for this outcome is "the drafting party of an unenforceable contract often gets away with it … [due to the fact that the responding party does not understand that law and/or how it applies in practice] … and the drafting party knows it."[126] Such informational asymmetries may be overcome by pointing out, whenever unenforceable contract terms are found, that such provisions are not lawful.

And, third, these self-help options draw attention to an unacknowledged problem with the status quo: failure to remove unenforceable terms run the risk of causing confusion about how the U.S. system works and what it considers socially beneficial behavior.[127] Although there are some incentives that discourage the inclusion of unenforceable terms in real estate settings, such as penalties put in place under Missouri House of Representatives Bill 1662,[128] there are few analogous protections that cover other types of property such as the interest that a long-term employment has in their job.[129] One way to address this issue is to enact new legislation, which provides more incentive to avoid adding new unenforceable terms in non-real estate settings.

In the event that more successors in interest decide to take up one of this essay's recommended self-help options, in order to clear up any confusion about how the U.S. legal system actually works and what it considers socially beneficial behavior, then they also may want to engage in the following related activities.[130] Initially, these property owners should find out what is required to remove a racially restrictive covenant in their state. These requirements, often, include procedural steps and monetary payments. An illustrative example of a U.S. state that requires both elements is Missouri.[131]

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[125] *See generally* Furth-Matzkin, *supra* note 7 at 1034-5 (explaining that unenforceable terms, too often ,"contravene the law or misinform consumers about their legal rights and remedies.").

[126] Mahmoud Khatib, *The Practical Effects Of Unenforceable Terms In Contracts*, KHATIB LAW LLC (Jan. 3, 2021), https://khatiblawllc.com/blog/why-unenforceable-contract-terms-work/.

[127] *See generally* Furth-Matzkin, *supra* note 7 at 1067 (explaining that recent studies "reveal that the presence of unenforceable terms discourages tenants from searching information online …, impedes tenants' ability to accurately process legal information obtained through online searches, and decreases the likelihood that they will take action against the noncompliant landlord when a dispute arises.").

[128] *See generally* Missouri House of Representatives Bill 1662, *supra* note 2 (outlining the "laws regarding restrictive covenants … [, which include limitations on recording some subsequent transfers, and] … expanding the definition of prohibited covenants.").

[129] *See generally* Khatib, *supra* note 126.

[130] *See generally* Furth-Matzkin, *supra* note 7 at 1067 (explaining that any alternate "solutions based on increasing consumer awareness of the legal environment should be combined with strong public enforcement and access to class action mechanisms.").

[131] *See generally* Missouri House of Representatives Bill 1662, *supra* note 2 (describing requirements for removing racially restrictive covenants and where such work is done).

Next, any reform-minded successor in interest would need to complete this work or get the previous owner of the encumbered property to do it for them. In either case, this current owner would do well to hire an attorney. In the first instance, a lawyer would increase the likelihood that every legal requirement is met by this successor in interest. Whereas in the second case, an attorney could insure that the previous owner meets every requirement.

Lastly, after completing the required work to remove a racially restrictive covenant, all updated real estate documents will need to be filed in its proper place. In Missouri, this filing information is provided by a recently-enacted statute.[132] This statute identifies Recorders of Deed as the one proper place.[133]

[132] *Id.* (describing new filing requirements to be imposed upon current property owners)
[133] *Id*. (same).